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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2004

Case No.: TIA-0262

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.² Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.³ Subpart E provides that all Subpart D claims will be considered as Subpart E claims.⁴ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an expeditor, truck driver and material handler at the DOE's K-25 Oak Ridge plant (the plant) for approximately forty years, from June 1945 to June 1949 and March 1951 to the December 1987.

The Applicant filed an application with the OWA, requesting physician panel review of asbestosis and prostate cancer. The Panel issued a positive determination for asbestosis. With respect to the prostate cancer claim, the Panel determined that the Worker's illness was not due to toxic exposure at the DOE site. The Panel noted that the record did not "evidence any substantial or prolonged workplace

¹ See OWA website, available at <http://www.eh.doe.gov/advocacy/index.html>

² Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

³ See *id.* § 3675(a).

⁴ See *id.* § 3681(g).

hazard exposures to which [the Applicant's] prostate cancer may be plausibly attributed."⁵

The OWA accepted the Panel's determinations. In his appeal, the Applicant challenges the negative determination.

In his appeal, the Applicant disagrees with the Panel's decision. He asserts that in addition to prostate cancer, he also has kidney problems and diabetes and believes that all of these conditions are related to his work at the site.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that his kidney problems and diabetes are related to his prostate cancer is not a basis for finding Panel error. The Panel addressed the Applicant's claim of prostate cancer, made a determination, and explained the reasoning for its conclusion. The Applicant's appeal is, at best, a disagreement with the Panel's medical judgment and, accordingly, does not indicate Panel error. Therefore, the appeal should be denied.

Finally, we note that new information may be available concerning the Worker's toxic exposures. The record indicates that, at the time the Panel considered the claim, the National Institute for Occupational Safety and Health (NIOSH) was in the process of performing a dose reconstruction.⁶ This NIOSH dose reconstruction may provide

⁵ Physician Panel Report at 2.

⁶ See Record (Case History).

further information that would support the Applicant's Subpart E claim.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0262, and hereby is, denied.
- (2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005